

GOVERNMENT PROPOSED JURY INST. NO. 16False Claim -- Offense Charged

The indictment sets forth \_\_\_\_\_ counts or charges.

Count \_\_\_\_\_ charges that on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_, in the \_\_\_\_\_ District of \_\_\_\_\_, the defendant, \_\_\_\_\_, a resident of \_\_\_\_\_, made and presented to the United States Treasury Department a claim against the United States for payment, which he [she] knew to be false, fictitious, or fraudulent, by [*e.g., preparing and causing to be prepared, and filing and causing to be filed, what purported to be a federal income tax return*], 1 which was presented to the United States Treasury Department, through the Internal Revenue Service, wherein he [she] claimed [*e.g., a refund of taxes*] 2 in the amount of \$\_\_\_\_\_, knowing such claim to be false, fictitious, or fraudulent.

Count II charges that \* \* \*.

All in violation of Title 18, United States Code, Section 287.

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**NOTES**

1 The instruction should be drafted so as to reflect the charge and basis for venue as set forth in the indictment.

2 The instruction should be drafted so as to reflect the charge as set forth in the indictment.

**COMMENT**

1 When the false claim charged was filed electronically, the prosecutor should insure that the indictment and instructions do not charge either the signing or the filing of a federal income tax return unless the paper Form 8453 relating to each false claim has

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18 U.S.C. § 287

been retrieved from the IRS and can be introduced into evidence along with the electronic portion of the return. The Form 8453 is a necessary part of the "tax return," and without it the government cannot prove that a "tax return" was filed. For further information, see "Prosecuting Electronic Fraud" (distributed to all U.S. Attorneys on February 6, 1993, and available from the Tax Division).

GOVERNMENT PROPOSED JURY INST. NO. 18

Statutory Language -- Section 287

Section 287 of Title 18 of the United States Code provides, in part, as follows:

Section 287. False, fictitious or fraudulent claims.

Whoever makes or presents to any person . . . in the civil . . . service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be . . . [***guilty of an offense against the laws of the United States***].

GOVERNMENT PROPOSED JURY INST. NO. 1918 U.S.C. 287 -- Purpose of the Statute

The objective of Congress in enacting section 287 was to assure the integrity of claims and vouchers submitted to the government, and thereby protect the funds and property of the government from fraudulent claims, regardless of the particular form of the claim or the particular function of the government department or agency against which the claim is made. Congress intended to prevent any deception that would impair, obstruct or defeat the lawful, authorized functions of government departments or agencies.

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Sand, Siffert, Loughlin & Reiss, ***Modern Federal Jury Instructions: Criminal*** (1993 Ed.), Vol. 1, Instruction 18-2, p. 18-3

***Rainwater v. United States***, 356 U.S. 590 (1958)

***United States v. Maher***, 582 F.2d 842 (4th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979).

GOVERNMENT PROPOSED JURY INST. NO. 20Elements of the Offense

In order to prove the crime of making a false claim, the government must establish beyond a reasonable doubt each of the following facts:

**First**, that on or about [*insert date*], the defendant knowingly made or presented a claim to [*insert (1) name of person or officer in the civil or military service of the United States or (2) name of department or agency of the United States*].

**Second**, that the claim which was presented was a claim against the United States or a department or agency of the United States.

**Third**, that the claim was false, fictitious, or fraudulent.

**Fourth**, that the defendant knew that the claim was false, fictitious, or fraudulent.

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Sand, Siffert, Loughlin & Reiss, **Modern Federal Jury Instructions: Criminal** (1993 Ed.), Vol. 1, Instruction 18-3, p. 18-4 (modified)

GOVERNMENT PROPOSED JURY INST. NO. 21First Element--Submission of Claim

The first element which the government must establish beyond a reasonable doubt is that the defendant knowingly made or presented a claim to [*insert (1) name of person or officer in the civil or military service of the United States or (2) name of department or agency of the United States*]. In this regard, I instruct you that [*insert name of person*] is a person (or officer) in the [*name of department or agency*].

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Sand, Siffert, Loughlin & Reiss, **Modern Federal Jury Instructions: Criminal** (1993 Ed.), Vol. 1, Instruction 18-4, p. 18-6 (modified)

GOVERNMENT PROPOSED JURY INST. NO. 22Second Element -- Claim Against the United States

The second element the government must prove beyond a reasonable doubt is that the claim was made or presented upon or against the United States or a department or agency of the United States.

If you find that the claim received by an agency or department of the United States was one which the agency or department was expected to pay, then this element of the offense is satisfied.

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Sand, Siffert, Loughlin & Reiss, **Modern Federal Jury Instructions: Criminal** (1993 Ed.), Vol. 1, Instruction 18-6, p. 18-11 (modified)

GOVERNMENT PROPOSED JURY INST. NO. 23

Third Element -- Claim was False, Fictitious or Fraudulent

The third element you must find beyond a reasonable doubt is that the claim was false, fictitious, or fraudulent.

A claim is false if it was untrue when made and was then known to be untrue by the person making it or causing it to be made.

A claim is fictitious if it is not real or if it does not correspond to what actually happened.

A claim is fraudulent if it was falsely made or caused to be made with the specific intent to deceive.

The question you must focus on is whether the claim in question contained any entry which you find from the evidence was false, fictitious, or fraudulent. You need not find that all of the entries on the claim were false, fictitious, or fraudulent, so long as you find that there was one entry which was false, fictitious, or fraudulent.

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Sand, Siffert, Loughlin & Reiss, **Modern Federal Jury Instructions: Criminal** (1993 Ed.), Vol. 1, Instruction 18-8, p. 18-8 (modified)



GOVERNMENT PROPOSED JURY INST. NO. 24Fourth Element -- Knowledge that Claim Was False

The fourth element the government must prove beyond a reasonable doubt is that the defendant had knowledge that the claim was false or fictitious or fraudulent.

An act is not done unlawfully or with knowledge of its false or fictitious or fraudulent character if it is done by mistake, carelessness, or other innocent reason.

It is not necessary, however, that the government prove that the defendant had exact knowledge of the relevant criminal provisions governing his conduct. You need only find that the defendant acted with knowledge that the claim was false or fictitious or fraudulent. **1**

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Sand, Siffert, Loughlin & Reiss, ***Modern Federal Jury Instructions: Criminal*** (1993 Ed.), Vol. 1, Instruction 18-9, p. 18-16 (modified)

**NOTE**

**1 CAUTION:** The courts have debated whether the government must prove that the defendant acted "willfully" (i.e., that the defendant knew he was violating the law) or that there was an intent to cause the government a loss. You should check the law of your circuit.

GOVERNMENT PROPOSED JURY INST. NO. 25False Claims Against the Government

Title 18, United States Code, Section 287, makes it a crime knowingly to make a false claim against any department or agency of the United States. You are instructed that the [***insert name of agency***] is a department or agency of the United States within the meaning of that law.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt;

**First:** That the defendant knowingly presented to an agency of the United States a false or fraudulent claim against the United States; and

**Second:** That the defendant knew that the claim was false or fraudulent.

A claim is "false" or "fraudulent" if it is untrue at the time it is made and is then known to be untrue by the person making it. It is not necessary to show, however, that the government agency was in fact deceived or misled.

To make a claim, the defendant need not directly submit the claim to an employee or agency of the United States. It is sufficient if the defendant submits the claim to a third party knowing that the third party will submit the claim or seek reimbursement from the United States (or a department or agency thereof).

If you find that the government has proved these things, you do not need to consider whether the false claim was material, although that term is used in the indictment. This is not a question for the jury to decide.

GOVERNMENT PROPOSED JURY INST. NO. 26False, Fictitious, Or Fraudulent Claims (Elements)

To sustain the charge of making a false claim, the government must prove the following propositions:

**First**, that the defendant (made or presented) a claim upon or against (the United States or a department or agency of the United States);

**Second**, that the claim was (false, fictitious, or fraudulent);

**Third**, that the defendant knew the claim was (false, fictitious, or fraudulent); and

**Fourth**, that the defendant submitted the claim with intent to defraud. <sup>1</sup>

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

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**Federal Criminal Jury Instructions of the Seventh Circuit** (1983 Ed.), Vol. II, p. 40.

**NOTE**

<sup>1</sup> The Fourth and the Ninth Circuits have held that it is not necessary to prove an intent to defraud when the charge is that the defendant filed a false claim for a refund. **United States v. Blecker**, 657 F.2d 629 (4th Cir. 1981), cert. denied, 454 U.S. 1150 (1982); **United States v. Milton**, 602 F.2d 231, 233 (9th Cir. 1979). See also Section 22.06(1), *supra*.

GOVERNMENT PROPOSED JURY INST. NO. 27

False, Fictitious, Or Fraudulent Claims  
(Claims Submitted to Third Parties)

To make a claim, the defendant need not directly submit the claim to an employee or agency of the United States. It is sufficient if the defendant submits the claim to a third party knowing that the third party will submit the claim or seek reimbursement from the United States (or a department or agency thereof).

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***Federal Criminal Jury Instructions of the Seventh Circuit*** (1983 Ed.), Vol. II, p. 42.

GOVERNMENT PROPOSED JURY INST. NO. 28Making a False Claim Against the United States

The crime of making a (false, fictitious, or fraudulent) claim against the United States, as charged in Count [*insert number of count*] of the indictment, has three essential elements, which are:

*One*, the defendant (made or presented) to [*insert name of U.S. officer or agency*] a claim against (the United States or name of department or agency of the United States);

*Two*, the claim was (false, fictitious, or fraudulent) in that [*describe how the claim was false, etc.*]; and

*Three*, the defendant knew the claim was (false, fictitious, or fraudulent).

[*Insert name of agency*] is an agency of the United States and [*describe the claim charged in the indictment*] is a claim against the United States.

(A claim is "false" or "fictitious" if any part of it is untrue when made, and then known to be untrue by the person making it or causing it to be made.) (A claim is "fraudulent" if any part of it is known to be untrue, and made or caused to be made with the intent to deceive the Government agency to which submitted.)

(The materiality of the matters set forth in Element Two is not a matter with which you are concerned and should not be considered by you in determining the guilt or innocence of the defendant.)

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*Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit*, (1992 Ed.), p. 166 (modified).

GOVERNMENT PROPOSED JURY INST. NO. 29Definition of Knowingly

When the word "knowingly" is used in these instructions, it means that the defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake or accident. [***Knowledge may be proved by the defendant's conduct, and by all the facts and circumstances surrounding the case.***]

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***Federal Criminal Jury Instructions of the Seventh Circuit*** (1980 Ed.), Vol. I, Sec. 6.03, p. 86 (modified).

GOVERNMENT PROPOSED JURY INST. NO. 30False Claims Against the Government

Title 18, United States Code, Section 287, makes it a Federal crime or offense for anyone to knowingly make a false claim against any department or agency of the United States.

You are instructed that the [*insert name of department or agency, e.g., Internal Revenue Service*] is a department or agency of the United States within the meaning of that law.

The defendant can be found guilty of the offense of making a false claim against the government only if all of the following facts are proved beyond a reasonable doubt:

**First:** That the defendant knowingly presented to an agency of the United States a false and fraudulent claim against the United States, as charged in the indictment; and

**Second:** That the defendant acted willfully and with knowledge of the false and fraudulent nature of his claim

A claim is "false" or "fraudulent" if it is untrue at the time it is made and is then known to be untrue by the person making it. It is not necessary to show, however, that the government agency was in fact deceived or misled.

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**Pattern Jury Instructions, Criminal Cases**, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 3, p. 68 (modified)

GOVERNMENT PROPOSED JURY INST. NO. 31Knowledge of Falsehood  
(Deliberate Ignorance)

The fact of knowledge may be established by direct or circumstantial evidence, just as any other fact in the case.

A defendant's knowledge may be inferred from proof beyond a reasonable doubt that the defendant deliberately closed his [her] eyes to what would otherwise have been obvious to him [her].

Thus, a finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from proof beyond a reasonable doubt of his [her] deliberate blindness to the existence of the fact.

It is entirely up to you as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. Although knowledge may be inferred from the defendant's behavior, the issue is what the defendant actually knew. A showing of mistake, carelessness, negligence, even gross negligence or recklessness, is not sufficient to support a finding of knowledge.

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See **United States v. MacKenzie**, 777 F.2d 811, 818 n.2 (2d Cir. 1985), *cert. denied*, 476 U.S. 1169 (1976)

**COMMENTS**

<sup>1</sup> The law on "deliberate ignorance" or "willful blindness" varies from circuit to circuit. Several circuits have indicated that "deliberate ignorance" instructions are rarely appropriate. See, e.g., **United States v. Mapelli**, 971 F.2d 284, 286 (9th Cir. 1992); **United States v. Ojebode**, 957 F.2d 1218, 1229 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1291 (1993); **United States v. deFranciso-Lopez**, 939 F.2d 1405, 1409 (10th Cir. 1991). Furthermore, several recent cases have found "deliberate ignorance" instructions to constitute reversible error when the evidence did not support the giving of the instruction. See, e.g., **United States v. Mapelli**, 971 F.2d at 287; **United States v. Barnhart**, 979 F.2d 647, 652-53 (8th Cir. 1992). But see **United States v. Stone**, 9 F.3d 934 (11th Cir. 1993).



As a result, great care should be exercised in the use of such an instruction. The law of the circuit should be carefully checked and no such instruction should be requested unless the evidence clearly supports it.

2 If the evidence does clearly support a "deliberate ignorance" instruction and a decision is made to request one, care still must be taken regarding its wording. In particular, no instruction should be requested in a criminal tax case which is inconsistent with the standard of willfulness set forth in ***Cheek v. United States***, 498 U.S. 192, 201 (1991), that is, a voluntary, intentional violation of a known legal duty.

3 Unlike the instruction set forth above, which requires actual knowledge, the "deliberate ignorance" instruction in ***United States v. Fingado***, 934 F.2d 1163, 1166 (10th Cir.), *cert. denied*, 112 S. Ct. 320 (1991), provides that the element of knowledge is established if the defendant is "aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." Although we believe that, in the context of a defendant's deliberate ignorance, this standard does satisfy the knowledge component of willfulness in criminal tax cases, we do not recommend its use (although, obviously, such an instruction may be used in the Tenth Circuit) because there is at least some risk that a court of appeals will hold that only a defendant's actual knowledge is sufficient.